



DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 38

RIN 2900-AR36

Allowances for Caskets and Urns for Unclaimed Remains of Veterans

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to revise its regulation that governs the program that furnishes caskets and urns for the burial of remains of veterans with no known next-of-kin (NOK) where sufficient resources are not available for this purpose. First, VA proposes to implement the Charles Duncan Buried with Honor Act of 2016 that expanded the casket and urn authority to apply to eligible veteran burials in State and Tribal cemeteries that received a VA cemetery grant. Further, VA proposes to issue flat-rate allowances for caskets and urns rather than calculate the average cost for those items on an annual basis. Using flat-rate allowances would promote consistency and efficiency in the administration of this program. Additionally, we propose an update to the casket specifications based on feedback from funeral directors and other funeral industry professionals. Finally, VA proposes to amend the regulation by eliminating the retroactive reimbursement provisions. This change would reflect the fact that these provisions are no longer needed because the relevant applicability period has passed.

DATES: Comments must be received by VA on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including

any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: <https://www.regulations.gov>. VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm an individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Daniel Catron, Supervisory Program Analyst, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420; Daniel.Catron@va.gov, telephone: (314) 416-6324 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Implementing Regulations for Statutory Program Expansion

Section 2306(f) of title 38, United States Code (U.S.C.), authorizes VA to furnish a casket or urn for burial of the unclaimed remains of veterans for whom VA cannot identify the NOK and determines that sufficient resources for the furnishing of a casket or urn for burial are not available. In 2016, Congress authorized an expansion of the casket and urn program to include VA grant-funded State and Tribal veterans' cemeteries. Therefore, burial of an eligible veteran must take place in a VA national cemetery or a veterans' cemetery of a State or Tribal Organization for which VA has provided a grant under 38 U.S.C. 2408. VA proposes to amend its regulations in 38 CFR 38.628 to reflect the expanded scope of the program. To implement this change,

we propose to revise the introductory text of paragraph (a) and the text of paragraph (c)(1) of § 38.628.

Flat-Rate Allowances

Consistent with other VA burial-related benefits, VA proposes to pay flat-rate allowances to individuals or entities that purchase caskets and urns for burial of unclaimed remains of veterans who die without NOK and sufficient resources for burial. Under current § 38.628(a), VA will reimburse any individual or entity for the actual cost of a casket or urn purchased for an eligible veteran, and under § 38.628(d), reimbursements will be capped by the average market cost for a 20-gauge metal casket or a durable urn during the fiscal year preceding the calendar year of the claim. In this proposed rule, VA would replace reimbursements based on actual costs capped by annual average market prices with flat-rate allowances that are based on historical payment averages.

Since the inception of the casket and urn reimbursement program eight years ago, VA has received feedback from funeral homes expressing dissatisfaction with VA's annual calculations of the average market costs, which many have stated do not reflect what they normally charge private individuals and entities, because the calculations do not include commercial mark-ups for caskets or urns. VA appreciates this input. We note that the purpose of the casket and urn program is to offset costs for individuals and entities that bring eligible veterans to VA national and grant-funded cemeteries, and not to purchase caskets or urns from funeral homes at the same rates funeral homes would charge in connection with commercial funerals or to reimburse the full cost of caskets and urns that may far exceed the regulatory standards. In order to avoid confusion regarding the "actual cost" standard, VA clarified the regulation by requiring that actual costs be shown by invoices reflecting the purchase price of the casket or urn purchased by the individual or entity requesting reimbursement.

Funeral homes have also expressed a lack of confidence in VA's annual average market cost calculations, given the wide variance in the maximum reimbursement rates from year to year. VA acknowledges the variations in the calculated maximum rates do not reflect actual variations in market costs over the same period, which have remained relatively static. Since the program began, the maximum reimbursement rate based on average market cost for a casket has fluctuated 96.8 percent, with a high of \$2,681 and a low of \$1,362. The maximum reimbursement rate based on average market cost for an urn has been as high as \$244 and as low as \$120, producing a 103.3-percent variance.

VA is also concerned that reimbursement at the purchase price as shown by an invoice has encouraged certain individuals and entities to attempt to inflate reimbursements. VA has frequently received invoices showing purchase prices equal to the year's maximum reimbursement rate. Because those rates were based on cost averages of market prices from the previous fiscal year, VA questioned the validity of those invoices. Actual fraud in these cases, however, is difficult to prove and costly for the government to prosecute.

After VA clarified the regulatory standard requiring an invoice showing purchase prices and began challenging questionable invoices, however, program utilization decreased.

In response to these issues, VA proposes to cease the annual calculation and payment of reimbursement rates that vary from year to year, which have created confusion and caused lack of confidence among those who participate in the program. VA believes those issues would be eliminated by the proposed payment of flat-rate allowances for eligible claims. This would be a more consistent and predictable method of offsetting the costs of caskets and urns purchased for the dignified interment of unclaimed veterans' remains.

To effectuate the flat-rate allowances, VA proposes to amend § 38.628 to remove all references to “reimburse” and “reimbursement” and replace them with “allowance”. These references would appear in the section heading of the regulation, the introductory text of paragraph (a), the introductory text of paragraph (c), and paragraph (d). We also propose to remove the text referring to actual cost in paragraph (a), and we propose to clarify in paragraph (a) that the amount of the allowances would be established in paragraph (d). As shown in proposed paragraph (e), VA would, on an annual basis, make cost-of-living adjustments for the flat-rate allowances using the Consumer Price Index, a methodology used in similar VA monetary allowances. Consistent with the Veterans Benefits Administration (VBA) cost increases for monetary allowances under 38 U.S.C. 2303, from June to June each year, the National Cemetery Administration (NCA) would apply the percentage increase (rounded to the nearest dollar) for caskets and urns. Use of VBA’s cost-of-living increase analysis would promote consistency across VA benefit programs and ensure the casket and urn allowances meet current costs, to the extent practicable.

For urns, VA proposes to use historical average payments made by VA, which were based on invoices showing the purchase prices of urns meeting the regulatory specifications. VA reviewed maximum reimbursement rates for urns applicable for calendar years 2015 (\$172), 2016 (\$244), 2017 (\$163), 2018 (\$169), 2019 (\$162), 2020 (\$149), and 2021 (\$145), which equates to an average annual reimbursement cap of \$172 during that period. VA also found that the average actual reimbursement rate during that period was \$138, which was the same as the average actual cost, shown by invoices, for a total of 77 urn claims. This payment average based on invoice price is lower than the \$172 average of annual reimbursement caps calculated from 2015 to 2021. We note that during that time frame, based on VA historical payment data, invoice prices for urns that met § 38.628(c)(5)(ii) specifications did not have any

significant increases or decreases. A flat rate allowance based on historical invoice payment data, which remained relatively static when compared to previously calculated maximum reimbursement rates based on market price cost averages that changed more significantly from year to year, is a more logical means of administering this benefit. Additionally, we believe this standard would encourage potential claimants to choose urns that meet the regulatory standards priced within the predictable and consistent flat-rate reimbursement amount. Based on this information, we propose the flat-rate allowance in paragraph (d) for urns to be \$138, which is reflective of the average VA reimbursement based on actual cost from 2015 to 2021 for urns meeting regulatory specifications. And, as noted previously, VA would annually assess the allowance for cost-of-living increases.

For caskets, VA proposes to revise the definition of a “casket” for allowance purposes in § 38.628(c)(5)(i) by removing the requirement for a gasketed seal. Based on input from funeral homes and other funeral industry professionals, the gasketed seal is not necessary, except when remains are transported by air in pressurized settings. Most claimants present casketed remains for interment that are locally transported by land from funeral homes, rendering the gasketed seal unnecessary. Also, gasketed caskets are more costly than non-gasketed caskets that still serve the purpose of safely containing human remains.

Similar to VA’s analysis supporting the proposed flat-rate urn allowance, VA considered historical payment data for caskets that met regulatory specifications for calendar years 2015 through 2021. The maximum reimbursement rates for gasketed caskets payable for claims from 2015 to 2021 were as follows: \$1,967, \$2,421, \$2,069, \$2,131, \$2,681, \$1,903, and \$1,984, which equate to an average annual reimbursement cap of \$2,165 during that period. However, the average actual reimbursement rate was \$1,426, which was the same as the average actual cost, shown by invoice, for a total of

1,912 casket claims. VA conducted market research for the proposed 20-gauge, metal, *non-gasketed* casket with external rails or swing arms costs for 2021, which showed an average market cost of \$801, which was \$227 less than the average market cost of \$1,028 for comparable gasketed-seal caskets in 2021. VA would deduct the \$227 average cost of a gasket from the \$1,426 historical payment average for gasketed-seal caskets to calculate the proposed flat-rate allowance of \$1,199. Elimination of the unnecessary expense of a gasketed casket for funeral homes and other purchasers of caskets for veteran burials would be a more cost-effective means of providing dignified burials of eligible unclaimed veterans' remains to be safely handled by cemetery employees. Additionally, use of the flat-rate allowance for caskets that are based on historical payment costs would be reflective of the average actual costs paid by claimants that bring unclaimed veterans to VA national and grant-funded cemeteries for burial. Although the historical payment data includes caskets allegedly priced at the maximum reimbursement rate, we do not believe that undermines our rationale for using this standard for calculating the casket flat-rate allowance because the casket prices at the maximum reimbursement rate were outliers and of questionable accuracy. We believe the revised flat-rate casket allowance would address expressed claimant concerns and impose practical internal controls for VA. For these reasons, VA proposes to adopt a flat-rate allowance for non-gasketed caskets, which we would continue to require to be of metal construction and at least 20-gauge thickness, designed for containing human remains, and include external fixed rails or swing arm handles. The flat-rate casket allowance would also be assessed annually for cost-of-living increases.

Eliminate Retroactive Reimbursement Provision

Finally, VA proposes to amend the regulation by eliminating the retroactive reimbursement provisions by removing paragraph (e) from § 38.628. Current paragraph

(e) allows for retroactive reimbursement for caskets or urns purchased before July 2, 2014, for burial of the remains of a veteran who died on or after January 10, 2014, to be paid at the calendar year 2015 rates. This provision was included because the casket and urn authority took effect on January 10, 2014, before the regulations were finalized on April 13, 2015. However, the paragraph is no longer necessary because the relevant time periods have passed. VA would pay the allowances that apply based on the date of claim for reimbursement.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612, because the number of claims and the amounts involved are expected to be small. We estimate the average cost of a burial receptacle that meets regulatory specifications under this rule would be \$1,199 for caskets and \$138 for urns in 2023. We also estimate that the total number of allowances for 2023 would be 259 for caskets and 18 for urns. Because the proposed

rulemaking would provide for issuance of an allowance, the individual or entity purchasing the burial receptacle would only be entitled to recoup the allowance rate, regardless of the actual purchase price. The purpose of the casket and urn reimbursement is to help offset a claimant's cost for bringing unclaimed veterans' remains to burial in a VA national or grant-funded cemetery. Generally, because the allowance is calculated based on historical average payments from qualifying purchase prices, this would result in the individual or entity avoiding a significant financial loss or gain for having made the purchase.

Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

Although this action contains provisions constituting collections of information at 38 CFR 38.628, under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or revised collections of information are associated with this proposed rule. The information collection for 38 CFR 38.628 is currently approved by the Office of Management and Budget (OMB) and has been assigned OMB control number 2900-0799.

List of Subjects 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Claims, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on November 30, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 38 as set forth below:

PART 38 – NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 2306, 2400, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

2. Amend § 38.628 by revising the section heading, the introductory text of paragraphs (a) and (c), and paragraphs (c)(1), (c)(5)(i), (d), and (e) to read as follows:

§ 38.628 Allowance for caskets and urns for unclaimed remains of veterans.

(a) VA will issue a flat-rate allowance, as established in paragraph (d) of this section, to any individual or entity for a casket or urn, purchased by the individual or entity for the burial in a national cemetery or in a veterans' cemetery of a State or Tribal

Organization that has received a grant under 38 U.S.C. 2408, of an eligible deceased veteran for whom VA:

* * * * *

(c) An individual or entity may request an allowance from VA under paragraph (a) of this section by completing and submitting VA Form 40-10088 and supporting documentation, in accordance with the instructions on the form. Prior to approving issuance of an allowance, VA must find all of the following:

(1) The veteran is eligible for burial in a VA national cemetery or in a veterans' cemetery of a State or Tribal Organization that has received a grant under 38 U.S.C. 2408;

* * * * *

(5) * * *

(i) Caskets must be of metal construction of at least 20-gauge thickness, designed for containing human remains, sufficient to contain the remains of the deceased veteran, and include external fixed rails or swing arm handles.

* * * * *

(d) The allowance for a claim received in any calendar year under paragraph (a) of this section is \$1,199.00 for a metal casket and \$138.00 for an urn of durable material.

(e) VA will make cost-of-living adjustments for the flat-rate casket and urn allowances using the Consumer Price Index (CPI). Each fiscal year, VA will provide a percentage increase (rounded to the nearest dollar) in the casket and urn flat-rate allowances equal to the percentage by which the CPI (all items, United States city average) for the 12-month period (June to June) preceding the beginning of the fiscal year for which the percentage increase is made exceeds the CPI for the 12-month

period preceding the 12-month period described in this paragraph (e). VA will only make cost-of-living increases to the flat rate allowances when the CPI has increased.

* * * * *

(Authority: 38 U.S.C. 2306, 2402, 2411)

[FR Doc. 2022-26672 Filed: 12/7/2022 8:45 am; Publication Date: 12/8/2022]